

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
COLUMBIA DIVISION

Progressive Northern Insurance	)	
Company,	)	
	)	
Plaintiff,	)	CIVIL ACTION NO: 3:24-cv-5773-SAL
	)	
vs.	)	
	)	
	)	<b>COMPLAINT FOR</b>
	)	<b>DECLARATORY JUDGMENT</b>
Sheila Middleton, Individually and as	)	
Personal Representative of the Estate of	)	
William T. Middleton; Marcus Gonzalez;	)	
Roberto Gonzalez;, Columbia Crane	)	
Operators, LLC; BJV Construction, Inc	)	
d/b/a BJV Construction of Lexington,	)	
Inc.; H. Eugene Trotter, Jr. and Charlotte	)	
Canada Trotter, Individually and as Co-	)	
Trustees of the H. Eugene Trotter, Jr.	)	
Trust; TreeZen, LLC; and Atlantic	)	
Casualty Insurance Company	)	
	)	
Defendants.	)	

COMES NOW, Plaintiff, Progressive Northern Insurance Company, by and through its undersigned counsel, complaining of the Defendants, Sheila Middleton, Individually and as Personal Representative of the Estate of William T. Middleton, Marcus Gonzalez, Roberto Gonzalez, Columbia Crane Operators, LLC, BJV Construction, Inc. d/b/a BJV Construction of Lexington Inc., H. Eugene Trotter, Jr. and Charlotte Canada Trotter, Individually and as Co-Trustees of the H. Eugene Trotter, Jr. Trust, TreeZen, LLC, and Atlantic Casualty Insurance Company, and seeks a declaratory judgment from this Honorable Court as set forth below.

**PARTIES AND JURISDICTION**

1. This is an action for declaratory judgment pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201 and Federal Rule of Civil Procedure, Rule 57, for the purposes

of determining a question of actual controversy between the parties as hereinafter more fully appears.

2. Progressive Northern Insurance Co. (“Progressive”) is a corporation organized under the laws of the State of Wisconsin with its principal place of business in the State of Ohio. Accordingly, Progressive is deemed a resident of the States of Wisconsin and Ohio.

3. Defendant, Sheila Middleton, individually and as the Personal Representative of the Estate of William Middleton (“Middleton”), is, upon information and belief, a citizen and resident of Lexington County, South Carolina. Defendant Middleton is the Personal Representative of the Estate of William Middleton, deceased. At the time of the underlying accident, Decedent William Middleton was a citizen and resident Lexington County, South Carolina, and by virtue of operation of 28 U.S.C. § 1332(c)(2), Defendant Middleton is deemed to be a citizen and resident of the State of South Carolina.

4. Defendant Marcus Gonzalez (“Marcus Gonzalez”) is a citizen and resident of Richland County, South Carolina.

5. Defendant Roberto Gonzalez (“Roberto Gonzalez”) is a citizen and resident of the State of South Carolina.

6. Defendant Columbia Crane Operators, LLC (“Columbia Crane”) is a South Carolina limited liability company. Upon information and belief, the sole member of Columbia Crane is Brenda Garcia Gonzalez, who is a citizen and resident of the State of South Carolina. Accordingly, Columbia Crane is deemed to be a resident of the State of South Carolina. Columbia Crane may be served with process care of its registered agent, Brenda Garcia Gonzalez, 133 Condor Rte, Lexington, South Carolina 29073.

7. Defendant BJV Construction Inc. d/b/a BJV Construction of Lexington, Inc. (“BJV Construction”) is a corporation incorporated under the laws of the State of South Carolina with a principal place of business in Lexington County, South Carolina. Accordingly, BJV Construction is deemed a resident of the State of South Carolina. BJV Construction may be served with process care of its registered agent, Roberto Vidal Gonzalez, 437 Burton Road, Lexington, South Carolina 29072.

8. Defendants H. Eugene Trotter, Jr. and Charlotte Canada Trotter, Individually and as Co-Trustees of the H. Eugene Trotter, Jr. Trust (“Trustees”) are upon information and belief residents and citizens of the State of South Carolina.

9. Defendant TreeZen, LLC (“TreeZen”) is a South Carolina limited liability company. Upon information and belief, William Middleton, deceased, was the sole member of TreeZen. As such, TreeZen is deemed to be a resident of the State of South Carolina.

10. Defendant Atlantic Casualty Insurance Company (“Atlantic Casualty”) is a corporation organized under the laws of the State of North Carolina with its principal place of business in the State of North Carolina. Atlantic Casualty may be served with process care of its Registered Agent, Corporation Service Company, 2626 Glenwood Ave, Ste. 550, Raleigh, North Carolina 27608.

11. Jurisdiction is proper in this Court, pursuant to 28 U.S.C. § 1332, because the Plaintiff and Defendants are citizens of different states and the amount in controversy exceeds \$75,000 exclusive of interests and costs. In further support of the amount in controversy threshold being met, the underlying personal injury action giving rise to this insurance coverage declaratory judgment action is pending before the Richland County Court of Common Pleas and involves

claims under the South Carolina Wrongful Death Act, S.C. Code § 15-51-10 *et seq.*, and the South Carolina Survival Act, S.C. Code § 15-5-90.

12. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2), because this is the judicial district in which a substantial part of the events or omissions giving rise to the claim occurred insofar as the accident giving rise to the controversy occurring within Richland County, South Carolina.

13. Venue is proper in this Division pursuant to Local Civ. Rule 3.01(A)(1) (D.S.C.), because this is the division in which a substantial part of the events or omissions giving rise to the claim occurred insofar as the accident giving rise to the controversy occurring within Richland County, South Carolina.

14. The Parties have an actual, present, adverse, and antagonistic interest insofar as Progressive, as in doubt with respect to its rights and obligations under a policy of insurance, and by this claim for declaratory relief, seeks a declaration of its rights and obligations under the aforesaid insurance policy with respect to claims asserted by or against the other parties to this action.

15. All proper and antagonistic parties or all parties having any interest in the outcome and adjudication of the present controversy are before the Court.

16. Pursuant to 28 U.S.C. § 2201 and Federal Rule of Civil Procedure, Rule 57, this Court is invested with the power to declare the rights and liabilities of the parties hereto and to give such relief as it deems necessary under the facts and circumstances presently existing.

## **FACTUAL BACKGROUND**

### **Relation of Parties, Accident, Underlying Litigation**

17. Prior to April 22, 2023, Trustees contracted with William Middleton and/or TreeZen to trim/remove several trees from a property owned by the H. Eugene, Jr. Trust located at 2 Cedarwood Lane, Columbia, South Carolina 29205 (the “Property”).

18. In order to perform this job, Middleton contacted Columbia Crane to provide a crane and a crane operator.

19. BJV Construction owned a 2019 Peterbilt 365 with attached crane (VIN 1NPSXJEX0KD274609 (the “Subject Crane”) that it rented to Columbia Crane on an annual basis pursuant to that certain “Equipment Rental Agreement” dated January 1, 2023 (the “Rental Agreement”).

20. BJV Construction was owned by Roberto Gonzalez.

21. Columbia Crane was owned by Brenda Garcia Gonzalez, the daughter of Roberto Gonzalez.

22. Pursuant to the arrangement between Columbia Crane and Todd Middleton/TreeZen, Columbia Crane provided the Subject Crane, along with a crane operator, Marcus Gonzalez.

23. At the time of the Accident, Marcus Gonzalez was an employee of Columbia Crane.

24. On or about April 22, 2023, while Marcus Gonzalez was operating the boom portion of the Subject Crane, with the outriggers on the Subject Crane extended and the truck portion of the 2019 Peterbilt fully elevated from the ground and incapable of being driven, a tree limb became disconnected from the sling attached to the boom and struck Todd Middleton (“the Accident”).

25. Todd Middleton sustained fatal injuries as a result of the Accident.

26. Middleton thereafter filed a personal injury lawsuit alleging damages including Wrongful Death and Survival in relation to the Accident in the Richland County Court of Common Pleas, which is captioned *Sheila Middleton, Individually and as Personal Representative of the Estate of William T. Middleton v. BJV Construction of Lexington, Inc., Marcus Gonzalez, Roberto Gonzalez, and H. Eugene Trotter, Jr. and Charlotte Canada Trotter, Individually and as Co-Trustees of the Estate of the H. Eugene Trotter, Jr. Trust*, , Case No. 2023-CP-40-04906 (the “Underlying Litigation”). A true and accurate copy of the operative First Amended Complaint from the Underlying Litigation is attached hereto as **Exhibit A**.

27. Progressive is affording BJV Construction, Marcus Gonzalez, and Roberto Gonzalez a defense to the Underlying Litigation pursuant to a full Reservation of Rights to deny coverage.

#### The Progressive Policy

28. At the time of the Accident, Progressive had issued Commercial Auto Liability Policy No. 954090922 to “BJV Construction of Lexington, Inc. Columbia Crane” with effective dates of December 8, 2022 through December 8, 2023 and affording Part I—Liability to Others coverage limits of \$1,000,000 Combined Single Limits, \$1,000,000 Combined Single Limits for Uninsured Motorists, \$100,000 Combined Single Limits for Underinsured Motorists, and \$1,000 for MedPay (the “Progressive Policy”). The Progressive Policy also contained Commercial General Liability Endorsement, as modified by the Limited General Liability-Trucking Operations Endorsement, affording coverage with \$1,000,000 each occurrence/\$2,000,000 aggregate with a products/completed operations endorsement with \$2,000,000 aggregate limits.

29. A true and accurate copy of the Progressive Policy with premiums redacted is attached hereto as **Exhibit B.**

30. The Progressive Policy provides, in relevant part, as follows:

**GENERAL DEFINITIONS**

**The words and phrases below, whether in the singular, plural or possessive, have the following special meanings when appearing in boldface type in this policy, and in endorsements issued in connection with this policy, unless specifically modified.**

2. **"Auto"** means a **land motor vehicle** or **trailer** designed for travel on public roads, or any other **land vehicle** that is subject to a compulsory or financial responsibility **law** or other motor vehicle insurance **law** in the state or province where it is licensed or principally garaged. It does not include **mobile equipment**. Self-propelled vehicles with the following types of permanently attached equipment are **autos**, not **mobile equipment**:
  - a. equipment designed and used primarily for:
    - (i) snow removal;
    - (ii) road maintenance, but not construction or resurfacing;
    - (iii) street cleaning;
  - b. cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and
  - c. air compressors, pumps, and generators, including spraying, welding, building cleaning, geophysical exploration, lighting, and well-servicing equipment
5. **"Employee"** includes a **leased worker** and a statutory employee. **Employee** does not include a **temporary worker**.

10. "**Mobile equipment**" means any of the following types of land vehicles, including, but not limited to, any attached machinery or equipment:
- a. Bulldozers, farm implements and machinery, forklifts, and other vehicles designed for use principally off public roads;
  - b. Vehicles **you** use **solely** on premises **you** own or rent and on accesses to public roads from these premises, **unless** specifically described on the **declarations page** and not defined as **mobile equipment** under other parts of this definition;

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- c. Any vehicle that travels on crawler treads, or that does not require licensing in the state in which **you** reside or **your** business is licensed;
  - d. Vehicles, whether self-propelled or not, used primarily to provide mobility to permanently attached:
    - (i) Power cranes, shovels, loaders, diggers, or drills; or
    - (ii) Road construction or resurfacing equipment, such as graders, scrapers or rollers.
  - e. Vehicles not described in Paragraphs a., b., c., or d. above that are not self-propelled and are used primarily to provide mobility to permanently attached equipment of the following types:
    - (i) Air compressors, pumps, and generators, including spraying, welding, building cleaning, geophysical exploration, lighting, and well-servicing equipment; or
    - (ii) Cherry pickers and similar devices used to raise or lower workers.
  - f. Vehicles not described in Paragraphs a., b., c., or d. above that are self-propelled and used primarily for purposes other than transportation of persons or cargo.

However, **mobile equipment** does not include land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state or province where it is licensed or principally garaged.



6. **"Insured auto" or "your insured auto" means:**
- a. Any **auto** specifically described on the **declarations page**; or
  - b. An additional **auto** for Part I—Liability To Others and/or Part II—Damage To Your Auto on the date **you** become the owner if:
    - (i) **you** acquire the **auto** during the policy period shown on the **declarations page**;

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- (ii) **we** insure all **autos** owned by **you** that are used in **your** business;
  - (iii) no other insurance policy provides coverage for that **auto**; and
  - (iv) **you** tell **us** within 30 days after **you** acquire it that **you** want **us** to cover it for that coverage.

If **you** add any coverage, increase **your** limits, or make any other changes to this policy during the 30-day period after **you** acquire an additional **auto**, these changes to **your** policy will not become effective until after **you** ask **us** to add the coverage, increase **your** limits, or make such changes for the additional **auto**. **We** may charge premium for the additional **auto** from the date **you** acquire the **auto**.

With respect to Part I—Liability To Others, if **we** provide coverage for an additionally acquired **auto** in accordance with this paragraph b., **we** will provide the same coverage for such additional **auto** as **we** provide for any **auto** shown on the **declarations page**.

With respect to Part II—Damage To Your Auto, if **we** provide coverage for an **auto** **you** acquire in addition to any **auto** specifically described on the **declarations page**, and the additional **auto** is:

- (i) a **private passenger auto**, **we** will provide the broadest coverage **we** provide for any **auto** shown on the **declarations page**; or
  - (ii) any **auto** other than a **private passenger auto**, and **you** have purchased Physical Damage coverage for at least one **auto** other than a **private passenger auto**, **we** will provide the broadest coverage for which the newly acquired **auto** is eligible.
- c. Any replacement **auto** on the date **you** become the owner if:
    - (i) **you** acquire the **auto** during the policy period shown on the **declarations page**;
    - (ii) the **auto** that **you** acquire replaces one specifically described on the **declarations page** due to termination of **your** ownership of the replaced **auto** or due to mechanical breakdown of, deterioration of, or **loss** to the replaced **auto** that renders it permanently inoperable; and
    - (iii) no other insurance policy provides coverage for that **auto**.

11. **"Occupying"** means in, on, entering or exiting.

20. **"We," "us" and "our"** mean the company providing this insurance as shown on the **declarations page**.
21. **"You," "your" and "yours"** refer to the named insured shown on the **declarations page**.

#### **PART I—LIABILITY TO OTHERS**

##### **INSURING AGREEMENT—LIABILITY TO OTHERS**

Subject to the Limits of Liability, if **you** pay the premium for liability coverage for the **insured auto** involved, **we** will pay damages, other than punitive or exemplary damages, for **bodily injury, property damage, and covered pollution cost or expense** for which an **insured** becomes legally responsible because of an **accident** arising out of the ownership, maintenance or use of that **insured auto**. However, **we** will only pay for the **covered pollution cost or expense** if the same **accident** also caused **bodily injury or property damage** to which this insurance applies.

- A. When used in Part I—Liability To Others, **insured** means:
1. **You** with respect to an **insured auto**.

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2. Any person while using, with **your** permission, and within the scope of that permission, an **insured auto you** own, hire, or borrow except:
    - (a) Any person while he or she is working in a business of selling, leasing, repairing, parking, storing, servicing, delivering or testing **autos**, unless that business is **yours** and it was so represented in **your** application.
    - (b) Any person while he or she is moving property to or from an **insured auto**, other than one of **your employees**, partners (if you are a partnership), members (if you are a limited liability company), or officers or directors (if you are a corporation).
    - (c) The owner or anyone **else** from whom the **insured auto** is leased, hired, or borrowed. However, this exception does not apply if the **insured auto** is specifically described on the **declarations page**.
    - (d) The employees or agents of an owner or anyone **else** from whom the **insured auto** is leased, hired or borrowed. However, this exception does not apply if the **insured auto** is specifically described on the **declarations page**.

For purposes of this subsection A.2., an **insured auto you** own includes any **auto** specifically described on the **declarations page**.
  3. Any other person or organization, but only with respect to the legal liability of that person or organization for acts or omissions of any person otherwise covered under this Part I—Liability To Others. If **we** make a filing or submit a certificate of insurance on **your** behalf with a regulatory or governmental agency, the term **"insured"** as used in such filing or certificate, and in any related endorsement, refers only to the person or organization named on such filing, certificate or endorsement.

- B. When used in Part I—Liability To Others, **insured auto** also includes:
1. **Trailers** designed primarily for travel on public roads, while connected to **your insured auto** that is a power unit;
  2. **Mobile equipment** while being carried or towed by an **insured auto**;
  3. Any **temporary substitute auto**; and
  4. **Mobile equipment** that is:
    - a. owned by **you**;
    - b. leased, hired, or borrowed by **you** and **you** have purchased either "Hired Auto Coverage" or "Any Automobile Legal Liability Coverage" from **us**; or
    - c. not owned, leased, hired, or borrowed by **you** and **you** have purchased either "Employer's Non-Ownership Liability Coverage" or "Any Automobile Legal Liability Coverage" from **us**.
- However, **mobile equipment** meeting any of those three criteria will qualify **only** if at the time of **loss** it is being:
- a. used in **your** business;
  - b. operated on a public highway; and
  - c. operated in a state or province where it is subject to a compulsory or financial responsibility law or other motor vehicle insurance law.

**EXCLUSIONS—PLEASE READ THE FOLLOWING EXCLUSIONS CAREFULLY. IF AN EXCLUSION APPLIES, COVERAGE FOR AN ACCIDENT OR LOSS WILL NOT BE AFFORDED UNDER THIS PART I—LIABILITY TO OTHERS.**

Coverage under this Part I, including **our** duty to defend, does not apply to:

3. **Worker's Compensation**  
Any obligation for which an **insured** or an insurer of that **insured**, even if one does not exist, may be held liable under workers' compensation, unemployment compensation, disability benefits law, or any similar law.

5. **Employee Indemnification and Employer's Liability**

**Bodily injury to:**

- a. An **employee** of any **insured** arising out of or within the course of:
  - (i) That **employee's** employment by any **insured**; or
  - (ii) Performing duties related to the conduct of any **insured's** business;
 or
- b. The spouse, child, parent, brother or sister of that **employee** as a consequence of Paragraph a. above.

This exclusion applies:

- a. Whether the **insured** may be liable as an employer or in any other capacity; and
- b. To any obligation to share damages with or repay someone else who must pay damages because of the injury.

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But this exclusion does not apply to **bodily injury** to a domestic **employee** if benefits are neither paid nor required to be provided under any workers' compensation, disability benefits, or similar law, or to liability for **bodily injury** assumed by the **insured** under an **insured contract**. For the purposes of this policy, a domestic **employee** is a person engaged in household or domestic work performed principally in connection with a residence premises.

6. **Fellow Employee**

**Bodily injury to:**

- a. a fellow **employee** of an **insured** injured while within the course of their employment or while performing duties related to the conduct of **your** business.
- b. the spouse, child, parent, brother, or sister of that fellow **employee** as a consequence of Paragraph a. above.

8. **Movement of Property by Mechanical Device**

**Bodily injury** or **property damage** resulting from or caused by the movement of property by a mechanical device, other than a hand truck, not attached to an **insured auto**.

13. **Operations**

**Bodily injury, property damage, or covered pollution cost or expense** arising out of the operation of:

- a. any equipment listed in Paragraphs b. and c. of the definition of **auto**; or

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- b. machinery or equipment that is on, attached to, or part of, a land vehicle that meets the definition of **mobile equipment**.

The South Carolian Amendatory Endorsement (Form 4881SC) amends the Commercial Auto Policy, as follows:

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Form 4881 SC (02/19)

**SOUTH CAROLINA AMENDATORY ENDORSEMENT**

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Except as specifically modified in this endorsement, all provisions of the Commercial Auto Policy apply.

**We** agree with **you** that the insurance provided under **your** Commercial Auto Policy is modified as follows:

**PART I—LIABILITY TO OTHERS**

A. The insuring agreement is modified to delete “other than punitive or exemplary damages,”

C. The following is added to the Exclusions section of Part I:

If a court with proper jurisdiction determines an exclusion is invalid or unenforceable because it does not satisfy the minimum requirements of the South Carolina Motor Vehicle Financial Responsibility Act, such exclusion shall apply only to that portion of the damages that is in excess of the minimum limits of liability required by that law.

The Progressive Policy contains a Mobile Equipment as Insured Autos Endorsement (Form Z228), which provides as follows:

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Form Z228 (01/11)

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**MOBILE EQUIPMENT AS INSURED AUTOS ENDORSEMENT**

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Except as specifically modified in this endorsement, all provisions of the Commercial Auto Policy apply.

**We** agree with **you** that the insurance provided under **your** Commercial Auto Policy is modified as follows:

**PART I—LIABILITY TO OTHERS**

**ADDITIONAL DEFINITIONS USED IN THIS PART ONLY** is modified as follows:

- B. When used in PART I—LIABILITY TO OTHERS, **insured auto** also includes:
1. **Trailers**, designed primarily for travel on public roads, while connected to **your insured auto** that is a power unit;
  2. **Mobile equipment** while being carried or towed by an **insured auto**;
  3. Any **temporary substitute auto**; and
  4. Any **mobile equipment** owned by **you**, or if **you** have purchased Hired Auto or Non-owned Auto coverage, leased or hired by **you**, when subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state or province where it is licensed or principally garaged. This does not change the effect of exclusion 13 concerning the operation of **mobile equipment**.



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Form 4757 SC (02/19)

### MEDICAL PAYMENTS COVERAGE ENDORSEMENT

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Except as specifically modified in this endorsement, all provisions of the Commercial Auto Policy apply.

**We** agree with **you** that the insurance provided under **your** Commercial Auto Policy is modified as follows:

#### INSURING AGREEMENT

Subject to the Limits of Liability, if **you** pay the premium for Medical Payments Coverage, **we** will pay the **usual and customary charge** for reasonable and necessary expenses, incurred within three years from the date of an **accident**, for medical and funeral services because of **bodily injury**:

1. sustained by an **insured**;
2. caused by an **accident**; and
3. arising out of the ownership, maintenance or use of a motor vehicle or **trailer**.

Any dispute as to the **usual and customary charge** will be resolved between the service provider and **us**.

#### ADDITIONAL DEFINITIONS

When used in this endorsement, whether in the singular, plural, or possessive:

1. **"Insured"** means:
  - a. if the named insured shown on the **declarations page** is a natural person:
    - (i) **you** while **occupying** any **auto**, other than an **auto owned** by **you** which is not an **insured auto**;
    - (ii) a **relative** while **occupying** an **insured auto**, **temporary substitute auto**, or **non-owned auto**;
    - (iii) **you** or any **relative** when struck by a land motor vehicle of any type, or a **trailer**, while not **occupying** a motor vehicle; and
    - (iv) any other person while **occupying** an **insured auto**, **temporary substitute auto**, or a **trailer** while attached to an **insured auto**; or
  - b. if the named insured shown on the **declarations page** is a corporation, partnership, organization or any other entity that is not a natural person, any person **occupying your insured auto**, **temporary substitute auto**, or a **trailer** while attached to an **insured auto**.  
For purposes of this definition, **insured auto** includes **mobile equipment** that is:
    - (i) owned by **you**;

- (ii) leased, hired, or borrowed by **you** and **you** have purchased either "Hired Auto Coverage" or "Any Automobile Legal Liability Coverage" from **us**; or
- (iii) not owned, leased, hired, or borrowed by **you** and **you** have purchased either "Employer's Non-Ownership Liability Coverage" or "Any Automobile Legal Liability Coverage" from **us**.

However, **mobile equipment** meeting any of those three criteria will be included in the definition only if at the time of **loss** it is being:

- (i) used in **your** business;
  - (ii) operated on a public highway; and
  - (iii) operated in a state or province where it is subject to a compulsory or financial responsibility law or other motor vehicle insurance law.
2. "**Non-owned auto**" means any **auto** that is not **owned** by **you** or furnished for **your** regular use and, if the named insured is a natural person, not **owned** by or furnished for the regular use of the named insured's spouse or a **relative**.
  3. "**Owned**" means the person or organization:
    - a. holds legal title to the vehicle;
    - b. has legal possession of the vehicle that is subject to a written security agreement with an original term of six months or more; or
    - c. has legal possession of the vehicle that is leased to that person or organization under a written agreement for a continuous period of six months or more.
  4. "**Owner**" means the person or organization who, with respect to a vehicle:
    - a. holds legal title to the vehicle;
    - b. has legal possession of the vehicle that is subject to a written security agreement with an original term of six months or more; or
    - c. has legal possession of the vehicle that is leased to that person or organization under a written agreement for a continuous period of six months or more.
  5. "**Usual and customary charge**" means an amount which **we** determine represents a customary charge for services in the geographical area in which the service is rendered. **We** shall determine the usual and customary charge through the use of independent sources of **our** choice.

**EXCLUSIONS—READ THE FOLLOWING EXCLUSIONS CAREFULLY. IF AN EXCLUSION APPLIES, COVERAGE WILL NOT BE AFFORDED UNDER THIS ENDORSEMENT.**

Coverage under this endorsement does not apply to **bodily injury**:

1. sustained while **occupying** any **auto** or **trailer** while being used as a residence or premises;
2. occurring during the course of employment if workers' compensation coverage should apply;
3. arising out of an **accident** involving an **auto** or **trailer** while being used by a person while employed or engaged in the business of selling, leasing, repairing, parking, storing, servicing, delivering, or testing vehicles, unless that business is **yours**;



4. resulting from any pre-arranged or organized racing, speed or demolition contest, stunting activity, or in practice or preparation for any such contest or activity;
5. due to a nuclear reaction or radiation;
6. for which insurance is afforded under a nuclear energy liability insurance contract;
7. for which the United States Government is liable under the Federal Tort Claims Act;
8. sustained by any person while **occupying** an **insured auto**, **temporary substitute auto**, or **trailer** without the express or implied permission of **you** or, if the named insured is a natural person, a **relative**;
9. sustained by any person while **occupying** a **non-owned auto** without the express or implied permission of the **owner**;
10. that is intentionally inflicted on an **insured** at that person's request or self-inflicted; or
11. sustained while **occupying** any vehicle that has less than four wheels or is not designed for operation principally upon public roads.

#### **LIMITS OF LIABILITY**

Regardless of the number of premiums paid, or the number of **insured autos** or **trailers** shown on the **declarations page**, or the number of policies issued by **us**, or the number of vehicles or **insureds** involved in an **accident**, or the number of claims or lawsuits arising out of an **accident**, **we** will pay no more than the Limit of Liability shown for Medical Payments Coverage on the **declarations page**.

Any amount payable to an **insured** under this endorsement will be reduced by any amount paid or payable for the same expense under Part I—Liability To Others or any applicable Uninsured/Underinsured Motorist Coverage Endorsement.

#### **OTHER INSURANCE**

If there is other applicable **auto** medical payments insurance, **we** will pay only **our** share of the medical and funeral services. **Our** share is the proportion that **our** limit of liability bears to the total of all applicable limits. However, any insurance **we** provide for an **insured occupying**:

1. an **auto**, other than an **insured auto** or **temporary substitute auto**; or
  2. a **trailer**, other than a **trailer** while connected to an **insured auto**;
- will be excess over any other **auto** or **trailer** insurance providing payments for medical or funeral expenses.

**ALL OTHER TERMS, LIMITS, AND PROVISIONS OF THE POLICY REMAIN UNCHANGED.**

Form 2852 SC (02/19)

**UNINSURED/UNDERINSURED  
MOTORIST COVERAGE ENDORSEMENT**

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Except as specifically modified in this endorsement, all provisions of the Commercial Auto Policy apply.

**We** agree with **you** that the insurance provided under **your** Commercial Auto Policy, and related endorsements, is modified as follows:

**INSURING AGREEMENT—UNINSURED MOTORIST COVERAGE**

Subject to the Limits of Liability, if **you** pay the premium for Uninsured Motorist Coverage, **we** will pay for damages which an **insured** is legally entitled to recover from the **owner** or operator of an **uninsured auto** because of **bodily injury** or **property damage**:

1. sustained by an **insured**;
2. caused by an **accident**; and
3. arising out of the ownership, maintenance, or use of an **uninsured auto**.

**INSURING AGREEMENT—UNDERINSURED MOTORIST COVERAGE**

Subject to the Limits of Liability, if **you** pay the premium for Underinsured Motorist Coverage, **we** will pay for damages that an **insured** is legally entitled to recover from the **owner** or operator of an **underinsured auto** because of **bodily injury** sustained by an **insured** or due to **property damage**:

1. caused by an **accident**; and
2. arising out of the ownership, maintenance, or use of an **underinsured auto**.

**We** will pay under this endorsement only after the limits of liability under all applicable liability bonds and policies have been exhausted by payment of judgments or settlements.

**ADDITIONAL DEFINITIONS**

When used in this endorsement, whether in the singular, plural, or possessive:

1. **"Insured"** means:
  - a. if the named insured shown on the **declarations page** is a natural person:
    - (i) **you** or a **relative**;
    - (ii) any person **occupying your insured auto** or a **temporary substitute auto**; and

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- (iii) any person who is entitled to recover damages covered by this endorsement because of **bodily injury** sustained by a person described in (i) or (ii) above; or
    - b. if the named insured shown on the **declarations page** is a corporation, partnership, organization, or any other entity that is not a natural person:
      - (i) any person **occupying your insured auto** or a **temporary substitute auto**; and
      - (ii) any person who is entitled to recover damages covered by this endorsement because of **bodily injury** sustained by a person described in (i) above.

For purposes of this definition, **insured auto** includes **mobile equipment** that is:

- a. owned by **you**;
- b. leased, hired, or borrowed by **you** and **you** have purchased either "Hired Auto Coverage" or "Any Automobile Legal Liability Coverage" from **us**; or
- c. not owned, leased, hired, or borrowed by **you** and **you** have purchased either "Employer's Non-Ownership Liability Coverage" or "Any Automobile Legal Liability Coverage" from **us**.

However, **mobile equipment** meeting any of those three criteria will be included in the definition only if at the time of **loss** it is being:

- (i) used in **your** business;
- (ii) operated on a public highway; and
- (iii) operated in a state or province where it is subject to a compulsory or financial responsibility law or other motor vehicle insurance law.

5. **"Underinsured auto"** means a land motor vehicle or **trailer** of any type to which bodily injury liability insurance or a bond applies at the time of the **accident** with limits of liability that equal or exceed the minimum amount required by the South Carolina motor vehicle financial responsibility law, but which are less than the amount of the damages sustained by the **insured** in the **accident**.

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An **"underinsured auto"** does not include any vehicle or equipment:

- a. operated on rails or crawler treads;
- b. designed mainly for use off public roads, while not on public roads;
- c. while used as a residence or premises;
- d. not required to be registered as a motor vehicle; or
- e. which is an **uninsured auto**.

6. “**Uninsured auto**” means an **auto** or **trailer** of any type:
- a. to which no bodily injury liability bond, cash deposit, security, or policy in at least the amounts of coverages required by South Carolina law applies at the time of the **accident**;
  - b. to which a bodily injury liability bond or policy applies at the time of the **accident**, but the bonding or insuring company:
    - (i) denies coverage;
    - (ii) is or becomes insolvent;
    - (iii) is in delinquency proceedings, suspension, or receivership; or
    - (iv) is financially unable to fully satisfy a judgment rendered in favor of an **insured person**;
  - c. to which a bodily injury liability bond or policy applies at the time of the **accident**, but its limit of liability is less than the minimum limit of liability specified by the financial responsibility law of the state in which the **insured auto** is principally garaged;
  - d. whose operator or **owner** cannot be identified and which causes an **accident** resulting in **bodily injury** to an **insured**, or **property damage**, provided:
    - (i) the **insured**, or someone on his or her behalf, reports the **accident** to the police or civil authority within 24 hours or as soon as practicable after the **accident**; and
    - (ii) if there has been no physical contact between the vehicle operated by the unidentified operator and the **insured**, or a vehicle occupied by the **insured**, there must be independent corroborative evidence by a witness to the **accident** who executes a signed affidavit attesting to the truth of the **accident** to prove that the **bodily injury** or **property damage** was proximately caused by the negligence or intentional actions of the unidentified operator of the motor vehicle. The testimony of the **owner** or operator of the **insured auto** shall not constitute independent corroborative evidence. No recovery will be provided under this endorsement if the **insured** was negligent in failing to determine the identity of the other motor vehicle and its driver at the time of the **accident**.

An “**uninsured auto**” does not include any motorized auto or equipment:

- a. **owned** or operated by a self-insurer under any applicable vehicle law, except a self-insurer that:
  - (i) is or becomes insolvent; or
  - (ii) fails to qualify as a self-insurer under South Carolina law;

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- b. **owned** by any governmental unit or agency, except when:
    - (i) operated by a person without proper authorization; or
    - (ii) a cause of action against that governmental unit or agency arising out of a motor vehicle **accident** is barred by the Tort Claims Act of South Carolina, as amended, or by any other applicable law;
  - c. operated on rails or crawler treads;
  - d. designed mainly for use off public roads, while not on public roads;
  - e. while being used as a residence or premises;
  - f. not required to be registered as a motor vehicle; or
  - g. which is an **underinsured motor vehicle**.

The Progressive Policy contains a Commercial General Liability Endorsement (Form Z433SC) that provides as follows:

**COMMERCIAL GENERAL LIABILITY ENDORSEMENT**

Various provisions in this endorsement restrict coverage. Read the entire endorsement carefully to determine **your** rights, duties, and what is and is not covered.

**We** agree with **you** that the following coverage is added to **your** Commercial Auto Policy:

7. "**Insured**" means:

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- a. If **you** are designated on the **Declarations Page** as:
- (i) An individual: **you** and **your** spouse, but only with respect to the conduct of a business of which **you** are the sole owner.
  - (ii) A partnership or joint venture: **you**. **Your** members, partners, and their spouses, are also **insureds**, but only with respect to the conduct of **your** business.
  - (iii) A limited liability company: **you**. **Your** members are also **insureds**, but only with respect to the conduct of **your** business. **Your** managers are **insureds**, but only with respect to their duties as **your** managers.
  - (iv) An organization other than a partnership, joint venture or limited liability company: **you**. **Your executive officers** and directors are also **insureds**, but only with respect to their duties as **your** officers or directors. **Your** stockholders are also **insureds**, but only with respect to their liability as stockholders.
  - (v) A trust: **you**. **Your** trustees are also **insureds**, but only with respect to their duties as trustees.



b. Each of the following is also an **insured**:

- (i) **Your** volunteer workers, but only while performing duties related to the conduct of **your** business.
- (ii) **Your** employees, other than **your executive officers** (if **you** are an organization other than a partnership, joint venture or limited liability company) or **your** managers (if **you** are a limited liability company), but only for acts within the scope of their employment by **you** or while performing duties related to the conduct of **your** business.

No employee or volunteer worker is an **insured** for:

(a) **Bodily injury or personal and advertising injury:**

- (1) to **you**, to **your** partners or members (if **you** are a partnership or joint venture), to **your** members (if **you** are a limited liability company), to a co-employee while in the course of his or her employment or while performing duties related to the conduct of **your** business, or to **your** other volunteer workers while performing duties related to the conduct of **your** business;
- (2) to the spouse, child, parent, brother, or sister of the co-employee or volunteer worker as a consequence of paragraph (a)(1) above;
- (3) for which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in paragraphs (a)(1) or (a)(2) above; or
- (4) arising out of his or her providing or failing to provide professional health care services.

(b) **Property damage** to property:

- (1) owned, occupied, or used by; or
- (2) rented to, in the care, custody or control of, or over which physical control is being exercised for any purpose by;

**you**, any of **your** employees, volunteer workers, any partner or member (if **you** are a partnership or joint venture), or any member (if **you** are a limited liability company).

- (iii) Any person (other than **your** employee or volunteer worker) or organization while acting as **your** real estate manager.
- (iv) Any person or organization having proper temporary custody of **your** property if **you** die, but only:
  - (a) with respect to liability arising out of the maintenance or use of that property; and
  - (b) until **your** legal representative has been appointed.
- (v) **Your** legal representative if **you** die, but only with respect to duties as such. That representative will have all **your** rights and duties under this endorsement.

c. Any organization **you** newly acquire or form, other than a partnership, joint venture or limited liability company, and over which **you** maintain ownership or majority interest, if there is no other similar insurance available to the organization. However:

- (i) Coverage under this provision is afforded only until the 90<sup>th</sup> day after **you** acquire or form the organization or the end of the policy period, whichever is earlier;
- (ii) Coverage A – Bodily Injury and Property Damage Liability does not apply to **bodily injury or property damage** that occurred before **you** acquired or formed the organization; and
- (iii) Coverage B – Personal and Advertising Injury Liability does not apply to **personal and advertising injury** arising out of an offense committed before **you** acquired or formed the organization.

No person or organization is an **insured** with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured on the **Declarations Page**.

8. **"Insured contract"**, for purposes of this endorsement only, means:
- a. A contract for a lease of premises. However, any portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to **you**, or while temporarily occupied by **you** with permission of the owner, is not an **insured contract**;
  - b. A sidetrack agreement;
  - c. Any easement or license agreement, except in connection with construction or demolition operations on, or within 50 feet of, a railroad;
  - d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
  - e. An elevator maintenance agreement; and
  - f. That part of any other contract or agreement pertaining to **your** business (including an indemnification of a municipality in connection with work performed for that municipality) under which **you** assume the tort liability of another party to pay for **bodily injury** or **property damage** to a third person or organization. Tort liability, as referred to in this provision, means a liability that would be imposed by law in the absence of any contract or agreement.

However, this paragraph f. does not include that part of any contract or agreement:

- (i) That indemnifies a railroad for **bodily injury** or **property damage** arising out of construction or demolition operations within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, roadbeds, tunnel, underpass or crossing;
  - (ii) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
    - (a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
    - (b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or
  - (iii) Under which the **insured**, if an architect, engineer or surveyor, assumes liability for injury or damage arising out of the **insured's** rendering or failure to render professional services, including those listed in (ii) above, and supervisory, inspection, architectural or engineering activities.
9. **"Loading or unloading"** means the handling of property:
- a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or **auto**;
  - b. While it is in or on an aircraft, watercraft or **auto**; or
  - c. While it is being moved from an aircraft, watercraft or **auto** to the place where it is finally delivered.
- However, **loading or unloading** does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or **auto**.

18. **"Your work"** means:

- a. Work or operations performed by **you** or on **your** behalf; and
- b. Materials, parts or equipment furnished in connection with such work or operations.

**Your work** includes:

- a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of **your work**; and
- b. The providing of or failure to provide warnings or instructions.

**SECTION I – COVERAGES**

**COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY**

**Insuring Agreement**

1. **We** will pay those sums, OTHER THAN PUNITIVE OR EXEMPLARY DAMAGES, that the **insured** becomes legally obligated to pay as damages because of **bodily injury** or **property damage** to which this insurance applies. **We** will have the right and duty to defend the **insured** against any **suit** seeking those damages. However, **we** will have no duty to defend the **insured** against any **suit** seeking damages for **bodily injury** or **property damage** to which this insurance does not apply. **We** may, at **our** discretion, investigate any **occurrence** and settle any claim or **suit** that may result.

However:

- a. The amount **we** will pay for damages is limited as described in Section II – Limits Of Liability; and
- b. **Our** right and duty to defend ends when **we** have used up the applicable limit of liability in the payment of judgments or settlements under Coverages A and B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

2. This insurance applies to **bodily injury** and **property damage** only if:
  - a. The **bodily injury** or **property damage** is caused by an **occurrence** that takes place in the **coverage territory**; and
  - b. The **bodily injury** or **property damage** occurs during the policy period.

Any **bodily injury** or **property damage**, whether such **bodily injury** or **property damage** is known or unknown, that first occurred prior to the inception date of this policy (or the retroactive date of this policy, if any, whichever is earlier), or that is, or alleged to be, in the process of occurring at the inception date of this policy (or the retroactive date of this policy, if any, whichever is earlier), even if the **occurrence** continues during this policy period, will be deemed to have occurred prior to the policy period. Any **bodily injury** or **property damage**, whether known or unknown, which is in the process of settlement, adjustment or **suit** as of the inception date of this policy (or the retroactive date of this policy, if any, whichever is earlier) will also be deemed to have occurred prior to the policy period.

**Bodily injury** or **property damage** that first occurs during this policy period includes any continuation, change or resumption of that **bodily injury** or **property damage** after the end of this policy period.

**EXCLUSIONS - READ THE FOLLOWING EXCLUSIONS CAREFULLY. IF AN EXCLUSION APPLIES, COVERAGE WILL NOT BE AFFORDED UNDER THIS ENDORSEMENT.**

Coverage under Coverage A does not apply to:



4. **Workers' Compensation and Similar Laws**

Any obligation for which an **insured** or an insurer of that **insured**, even if one does not exist, may be held liable under workers' compensation, unemployment compensation, disability benefits law, or any similar law.

5. **Employer's Liability**

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**Bodily injury** to:

- a. An employee of any **insured** arising out of or within the course of:
  - (i) That employee's employment by any **insured**; or
  - (ii) Performing duties related to the conduct of any **insured's** business; or
- b. The spouse, child, parent, brother or sister of that employee as a consequence of paragraph a. above.

This exclusion applies:

- a. Whether the **insured** may be liable as an employer or in any other capacity; and
- b. To any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the **insured** under an **insured contract**.

6. **Aircraft, Auto or Watercraft**

**Bodily injury or property damage** arising out of:

- a. The ownership, maintenance, use, or entrustment to others of any aircraft, **auto** or watercraft owned or operated by, or rented, leased or loaned to, any **insured**; or
- b. Any **auto you** do not own, lease, hire, rent or borrow that is used in connection with **your** business.

Use includes operation and **loading or unloading**.

This exclusion applies even if the claims against any **insured** allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that **insured**, if the **occurrence** that caused the **bodily injury or property damage** involved the ownership, maintenance, use or entrustment to others of any aircraft, **auto** or watercraft that is owned or operated by, or rented or loaned to, any **insured**.

This exclusion does not apply to:

- a. A watercraft while ashore on premises **you** own or rent;
- b. A watercraft **you** do not own that is:
  - (i) Less than 26 feet long; and
  - (ii) Not being used to carry persons or property for a charge;
- c. Parking an **auto** on, or on the ways next to, premises **you** own or rent, provided the **auto** is not owned by, or rented or loaned to, **you** or the **insured**;
- d. Liability assumed under any **insured contract** for the ownership, maintenance or use of aircraft or watercraft; or
- e. **Bodily injury or property damage** arising out of:
  - (i) The operation of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under the definition of **mobile equipment** if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged; or
  - (ii) The operation of any machinery or equipment listed in paragraph b. or c. of the definition of **auto**.

7. **Mobile Equipment**

**Bodily injury or property damage** arising out of:

- a. The transportation of **mobile equipment** by an **auto** owned or operated by, or rented or loaned to, any **insured**; or
- b. The use of **mobile equipment** in, while in practice for, or while being prepared for, any prearranged racing, speed, demolition, or stunting activity.

The Progressive Policy contains a Limited General Liability – Trucking Operations Endorsement (Form 2371), which further modifies the Commercial General Liability coverage afforded under the Progressive Policy, and provides as follows:

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Form 2371 (06/10)

**LIMITED GENERAL LIABILITY - TRUCKING OPERATIONS ENDORSEMENT**

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This endorsement modifies insurance provided under the Commercial General Liability coverage form.

If **your declarations page** shows Limited General Liability, and this form number shows on the attachment line, then the Commercial General Liability coverage form is modified as follows:

**GENERAL POLICY EXCLUSIONS**

**The following exclusion is applicable to both Coverage A and Coverage B.**

This endorsement provides no coverage for the following:

**12. Other than Trucking Operations**

**Bodily injury, property damage, or personal or advertising injury** arising out of any activity other than the insured's trucking operations or suffered by any person present at the **insured's** premises for reasons that, principally, are not related to the conduct of the **insured's** trucking operations. For purposes of this exclusion, the following are deemed to be other than trucking operations and are excluded:

- (i) the use of the **insured's** property for any non-business purpose, such as, for example, a residence; or
- (ii) the conduct of any business activity or the rendering of any professional service that is not a necessary part of the **insured's** trucking operations.

**ALL OTHER TERMS, LIMITS, AND PROVISIONS OF THE POLICY REMAIN UNCHANGED.**

The Progressive Policy contains a Blanket Additional Insured Endorsement (Form 2366), which provides as follows:

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Form 2366 (02/11)

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**BLANKET ADDITIONAL INSURED ENDORSEMENT**

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This endorsement modifies insurance provided by the Commercial Auto Policy, Motor Truck Cargo Legal Liability Coverage Endorsement, and/or Commercial General Liability Coverage Endorsement, as appears on the **declarations page**. All terms and conditions of the policy apply unless modified by this endorsement.

If **you** pay the fee for this Blanket Additional Insured Endorsement, **we** agree with **you** that any person or organization with whom **you** have executed a written agreement prior to any **loss** is added as an additional **insured** with respect to such liability coverage as is afforded by the policy, but this insurance applies to such additional **insured** only as a person or organization **liable** for **your** operations and then **only** to the extent of that liability. This endorsement does not apply to acts, omissions, products, work, or operations of the additional **insured**.

Regardless of the provisions of paragraph a. and b. of the "Other Insurance" clause of this policy, if the person or organization with whom **you** have executed a written agreement has other insurance under which it is the first named **insured** and that insurance also applies, then this insurance is primary to and non-contributory with that other insurance when the written contract or agreement between **you** and that person or organization, signed and executed by **you** before the **bodily injury** or **property damage** occurs and in effect during the policy period, requires this insurance to be primary and non-contributory.

In no way does this endorsement waive the "Other Insurance" clause of the policy, nor make this policy primary to third parties hired by the **insured** to perform work for the **insured** or on the **insured's** behalf.

**ALL OTHER TERMS, LIMITS, AND PROVISIONS OF THE POLICY REMAIN UNCHANGED.**

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The UM/UIM endorsement on the Progressive Policy provides as follows:

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Form 2852 SC (02/19)

**UNINSURED/UNDERINSURED  
MOTORIST COVERAGE ENDORSEMENT**

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Except as specifically modified in this endorsement, all provisions of the Commercial Auto Policy apply.

**We** agree with **you** that the insurance provided under **your** Commercial Auto Policy, and related endorsements, is modified as follows:

**INSURING AGREEMENT—UNINSURED MOTORIST COVERAGE**

Subject to the Limits of Liability, if **you** pay the premium for Uninsured Motorist Coverage, **we** will pay for damages which an **insured** is legally entitled to recover from the **owner** or operator of an **uninsured auto** because of **bodily injury** or **property damage**:

1. sustained by an **insured**;
2. caused by an **accident**; and
3. arising out of the ownership, maintenance, or use of an **uninsured auto**.

**INSURING AGREEMENT—UNDERINSURED MOTORIST COVERAGE**

Subject to the Limits of Liability, if **you** pay the premium for Underinsured Motorist Coverage, **we** will pay for damages that an **insured** is legally entitled to recover from the **owner** or operator of an **underinsured auto** because of **bodily injury** sustained by an **insured** or due to **property damage**:

1. caused by an **accident**; and
2. arising out of the ownership, maintenance, or use of an **underinsured auto**.

**We** will pay under this endorsement only after the limits of liability under all applicable liability bonds and policies have been exhausted by payment of judgments or settlements.

**ADDITIONAL DEFINITIONS**

When used in this endorsement, whether in the singular, plural, or possessive:

1. **"Insured"** means:

- b. if the named insured shown on the **declarations page** is a corporation, partnership, organization, or any other entity that is not a natural person:
  - (i) any person **occupying your insured auto** or a **temporary substitute auto**; and
  - (ii) any person who is entitled to recover damages covered by this endorsement because of **bodily injury** sustained by a person described in (i) above.

For purposes of this definition, **insured auto** includes **mobile equipment** that is:

- a. owned by **you**;
- b. leased, hired, or borrowed by **you** and **you** have purchased either "Hired Auto Coverage" or "Any Automobile Legal Liability Coverage" from **us**; or
- c. not owned, leased, hired, or borrowed by **you** and **you** have purchased either "Employer's Non-Ownership Liability Coverage" or "Any Automobile Legal Liability Coverage" from **us**.

However, **mobile equipment** meeting any of those three criteria will be included in the definition only if at the time of **loss** it is being:

- (i) used in **your** business;
- (ii) operated on a public highway; and
- (iii) operated in a state or province where it is subject to a compulsory or financial responsibility law or other motor vehicle insurance law.

"**Non-owned auto**" means any auto that is not owned by you or furnished

- 3. "**Owned**" means the person or organization:
  - a. holds legal title to the vehicle;
  - b. has legal possession of the vehicle that is subject to a written security agreement with an original term of six months or more; or
  - c. has legal possession of the vehicle that is leased to that person or organization under a written agreement for a continuous period of six months or more.
- 4. "**Owner**" means the person or organization who, with respect to a vehicle:
  - a. holds legal title to the vehicle;
  - b. has legal possession of the vehicle that is subject to a written security agreement with an original term of six months or more; or
  - c. has legal possession of the vehicle that is leased to that person or organization under a written agreement for a continuous period of six months or more.
- 5. "**Underinsured auto**" means a land motor vehicle or **trailer** of any type to which bodily injury liability insurance or a bond applies at the time of the **accident** with limits of liability that equal or exceed the minimum amount required by the South Carolina motor vehicle financial responsibility law, but which are less than the amount of the damages sustained by the **insured** in the **accident**.

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An "**underinsured auto**" does not include any vehicle or equipment:

- a. operated on rails or crawler treads;
- b. designed mainly for use off public roads, while not on public roads;
- c. while used as a residence or premises;
- d. not required to be registered as a motor vehicle; or
- e. which is an **uninsured auto**.



6. **"Uninsured auto"** means an **auto** or **trailer** of any type:
- a. to which no bodily injury liability bond, cash deposit, security, or policy in at least the amounts of coverages required by South Carolina law applies at the time of the **accident**;
  - b. to which a bodily injury liability bond or policy applies at the time of the **accident**, but the bonding or insuring company:
    - (i) denies coverage;
    - (ii) is or becomes insolvent;
    - (iii) is in delinquency proceedings, suspension, or receivership; or
    - (iv) is financially unable to fully satisfy a judgment rendered in favor of an **insured person**;
  - c. to which a bodily injury liability bond or policy applies at the time of the **accident**, but its limit of liability is less than the minimum limit of liability specified by the financial responsibility law of the state in which the **insured auto** is principally garaged;
  - d. whose operator or **owner** cannot be identified and which causes an **accident** resulting in **bodily injury** to an **insured**, or **property damage**, provided:
    - (i) the **insured**, or someone on his or her behalf, reports the **accident** to the police or civil authority within 24 hours or as soon as practicable after the **accident**; and
    - (ii) if there has been no physical contact between the vehicle operated by the unidentified operator and the **insured**, or a vehicle occupied by the **insured**, there must be independent corroborative evidence by a witness to the **accident** who executes a signed affidavit attesting to the truth of the **accident** to prove that the **bodily injury** or **property damage** was proximately caused by the negligence or intentional actions of the unidentified operator of the motor vehicle. The testimony of the **owner** or operator of the **insured auto** shall not constitute independent corroborative evidence. No recovery will be provided under this endorsement if the **insured** was negligent in failing to determine the identity of the other motor vehicle and its driver at the time of the **accident**.

An **"uninsured auto"** does not include any motorized auto or equipment:

- a. **owned** or operated by a self-insurer under any applicable vehicle law, except a self-insurer that:
  - (i) is or becomes insolvent; or
  - (ii) fails to qualify as a self-insurer under South Carolina law;
- b. **owned** by any governmental unit or agency, except when:
  - (i) operated by a person without proper authorization; or
  - (ii) a cause of action against that governmental unit or agency arising out of a motor vehicle **accident** is barred by the Tort Claims Act of South Carolina, as amended, or by any other applicable law;
- c. operated on rails or crawler treads;
- d. designed mainly for use off public roads, while not on public roads;
- e. while being used as a residence or premises;
- f. not required to be registered as a motor vehicle; or
- g. which is an **underinsured motor vehicle**.

**EXCLUSIONS—READ THE FOLLOWING EXCLUSIONS CAREFULLY. IF AN EXCLUSION APPLIES, COVERAGE WILL NOT BE AFFORDED UNDER THIS ENDORSEMENT.**

1. Coverage under this endorsement is not provided for **bodily injury** or **property damage** sustained by any person while using or **occupying**:
  - a. an **insured auto** without the express or implied permission of **you** or, if the named insured is a natural person, a **relative**;
  - b. a **non-owned auto** without the express or implied permission of the **owner**; or
  - c. any motor vehicle **owned** by **you** or, if the named insured is a natural person, a **relative**, unless uninsured motorist coverage or underinsured motorist coverage has been purchased for the motor vehicle.
2. Coverage under this endorsement will not apply directly or indirectly to benefit any insurer or self-insurer under any of the following or similar laws:
  - a. workers' compensation law; or

The Progressive Policy contains a Medical Payments Coverage Endorsement (Form 4757SC), which provides as follows:

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Form 4757 SC (02/19)

**MEDICAL PAYMENTS COVERAGE ENDORSEMENT**

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Except as specifically modified in this endorsement, all provisions of the Commercial Auto Policy apply.

**We** agree with **you** that the insurance provided under **your** Commercial Auto Policy is modified as follows:

**INSURING AGREEMENT**

Subject to the Limits of Liability, if **you** pay the premium for Medical Payments Coverage, **we** will pay the **usual and customary charge** for reasonable and necessary expenses, incurred within three years from the date of an **accident**, for medical and funeral services because of **bodily injury**:

1. sustained by an **insured**;
2. caused by an **accident**; and
3. arising out of the ownership, maintenance or use of a motor vehicle or **trailer**.

**ADDITIONAL DEFINITIONS**

When used in this endorsement, whether in the singular, plural, or possessive:

1. **"Insured"** means:



- b. if the named insured shown on the **declarations page** is a corporation, partnership, organization or any other entity that is not a natural person, any person **occupying your insured auto, temporary substitute auto,** or a **trailer** while attached to an **insured auto**.  
For purposes of this definition, **insured auto** includes **mobile equipment** that is:
- (i) owned by **you**;

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- (ii) leased, hired, or borrowed by **you** and **you** have purchased either "Hired Auto Coverage" or "Any Automobile Legal Liability Coverage" from **us**; or
  - (iii) not owned, leased, hired, or borrowed by **you** and **you** have purchased either "Employer's Non-Ownership Liability Coverage" or "Any Automobile Legal Liability Coverage" from **us**.
- However, **mobile equipment** meeting any of those three criteria will be included in the definition only if at the time of **loss** it is being:
- (i) used in **your** business;
  - (ii) operated on a public highway; and
  - (iii) operated in a state or province where it is subject to a compulsory or financial responsibility law or other motor vehicle insurance law.
3. "**Owned**" means the person or organization:
- a. holds legal title to the vehicle;
  - b. has legal possession of the vehicle that is subject to a written security agreement with an original term of six months or more; or
  - c. has legal possession of the vehicle that is leased to that person or organization under a written agreement for a continuous period of six months or more.
4. "**Owner**" means the person or organization who, with respect to a vehicle:
- a. holds legal title to the vehicle;
  - b. has legal possession of the vehicle that is subject to a written security agreement with an original term of six months or more; or
  - c. has legal possession of the vehicle that is leased to that person or organization under a written agreement for a continuous period of six months or more.

**EXCLUSIONS—READ THE FOLLOWING EXCLUSIONS CAREFULLY. IF AN EXCLUSION APPLIES, COVERAGE WILL NOT BE AFFORDED UNDER THIS ENDORSEMENT.**

Coverage under this endorsement does not apply to **bodily injury**:

- 1. sustained while **occupying** any vehicle that has less than four wheels or is not designed for operation principally upon public roads.

**FOR A FIRST CAUSE OF ACTION**  
**(Declaratory Judgment as to Progressive Policy)**

31. Progressive restates the foregoing allegations of the Complaint not inconsistent herewith and incorporates the same herein by reference.

32. The Progressive Policy affords no liability insurance coverage under Part I—Liability to Others coverage, and accordingly Progressive has no duty to defend or indemnify any individual or entity in connection with any claim arising from or relating to the Accident including but not limited to those claims alleged in the Underlying Litigation, because the Subject Crane does not qualify as an “insured auto” under the Policy and/or falls under various exclusions which removes the Accident from under the Progressive Policy. More specifically:

- a. The Subject Crane qualifies as “mobile equipment” under the Progressive Policy. The Progressive Policy defines “mobile equipment” as “any of the following types of land vehicles, including, but not limited to, any attached machinery or equipment: d. Vehicles, whether self-propelled or not, used primarily to provide mobility to permanently attached: (i) Power cranes . . . and (f) Vehicles not described in Paragraphs a., b., c., or d. above that are self-propelled and used primarily for purposes other than transportation of persons or cargo.” There is an exception from the definition of mobile equipment for land vehicles that are subject to compulsory or financial responsibility law or other motor vehicle insurance law in the state or province where it is licensed or principally garaged. However, under established South Carolina law, the Subject Crane as it was being used at the time of the Accident is not subject to compulsory or financial responsibility law or other motor vehicle insurance law in the State of South Carolina. *See, e.g. Canal v. Ins. Co. v. Insurance Company of North America*, 431 S.E.2d. 577 (S.C. 1993) (holding there is no mandatory coverage for a crane under South Carolina law when used solely as a crane, provided that an auto liability policy provides for a clear exclusion to coverage under such circumstances). As such, the Subject Crane would qualify as “mobile equipment” under this definition of the Progressive Policy.
- b. The Progressive Policy, as modified by the Mobile Equipment as Insured Autos Endorsement (Z228) (with emphasis added) provides as follows:

## **PART I—LIABILITY TO OTHERS**

### **ADDITIONAL DEFINITIONS USED IN THIS PART ONLY**

- B. When used in Part I—LIABILITY TO OTHERS, “insured auto” also includes:
  2. “Mobile equipment” while being carried or towed by an “insured auto”  
\* \* \*
  4. Any “mobile equipment” owned by “you” . . . *when subject to a compulsory or financial responsibility law or other motor vehicle insurance law* in the state or province where it is licensed or principally

garaged. *This does not change the effect of exclusion 13 concerning the operation of “mobile equipment.”*

Exclusion 13 for Part I—Liability to Others coverage, provides as follows:

Coverage under this Part I, including “our” duty to defend does not apply to:

13. Operations

“Bodily injury” . . . arising out of the operation of:

b. machinery or equipment that is on, attached to, or part of, a land vehicle that meets the definition of “mobile equipment”

- c. Thus, even assuming *arguendo* the Subject Crane qualifies as an “insured auto” under the Progressive Policy, the Operations Exclusion for mobile equipment under the Progressive Policy, removes the Accident from coverage under Part I—Liability to Others, including any duty to defend or indemnify, under the Progressive Policy because the loss arose merely out of the operation of the crane portion of the Subject Crane; and
- d. Additionally, and alternatively, to the extent the Subject Crane does qualify as an “insured auto” entitled to Part I—Liability to Others coverage under the Progressive Policy, the foregoing notwithstanding, to the extent that William Middleton is deemed a statutory employee or an employee of any “insured” under the Progressive Policy for purposes of workers compensation benefits, then Exclusions No. 3, 5, and 6, the Worker’s Compensation, Employee Indemnification and Employer’s Liability, and Fellow Employee exclusions, respectively, would result in an exclusion to coverage under Part I—Liability to Others Coverage under the Progressive Policy.

33. The Progressive Policy affords no coverage under the Commercial General Liability endorsement provisions of the Progressive Policy, as limited by the Limited General Liability – Trucking Operations Endorsement (Form 2371), and accordingly Progressive has no duty to defend or indemnify any individual or entity in connection with any claim arising from or relating to the Accident including but not limited to those claims alleged in the Underlying Litigation, because operating the Subject Crane, solely in the capacity as a crane, is not “a necessary part” of BJV Construction’s trucking operations. Moreover, to the extent there is otherwise coverage available under the CGL endorsement, to the extent that William Middleton is deemed a statutory employee or employee of any “insured” under the Progressive Policy, including the CGL

provisions thereto, Exclusions No. 4 and 5, the Workers Compensation and Similar Laws and Employer's Liability exclusions, respectively, remove the Accident from CGL coverage under the Progressive Policy.

34. The Progressive Policy affords no Uninsured or Underinsured Motorists coverage for the Accident, and accordingly Progressive has no duty to defend or indemnify any individual or entity in connection with any claim arising from or relating to the Accident including but not limited to those claims alleged in the Underlying Litigation, because:

- a. The Progressive Policy was issued in the name of a "corporation, partnership, organization or any other entity that is not a natural person" and thus a person qualifies as an "insured" entitled to pursue UM/UIM coverage under the Progressive Policy only if they were "occupying" an "insured auto" or "temporary substitute auto;"
- b. For purposes of the UM/UIM endorsement, "mobile equipment" only qualifies as an "insured auto" when: (1) it is being used in the business of BJV Construction; (2) operated on a public highway; *and* (3) operated in a state or province where it is subject to compulsory or financial responsibility law or other motor vehicle insurance law;
- c. The Subject Crane was not being used in furtherance of BJV Construction's business at the time of the Accident insofar as the Subject Crane was being used solely in furtherance of the business interests of Columbia Crane, a separate business owned by Roberto Gonzalez's daughter;
- d. The Subject Crane was not being operated on a public highway at the time of the Accident;
- e. Pursuant to *Canal* the Subject Crane was not subject to compulsory financial responsibility law or other motor vehicle insurance law when it was being used in the capacity it was, with the outriggers extended, at the time of the Accident; and
- f. The damages alleged in the Underlying Litigation were not caused by the "owner or operator" of an "uninsured auto" or "underinsured auto."

35. The Progressive Policy affords no MedPay coverage for the Accident, and accordingly Progressive has no duty to defend or indemnify any individual or entity in connection with any

claim arising from or relating to the Accident including but not limited to those claims alleged in the Underlying Litigation, because:

- a. The Progressive Policy was issued in the name of a “corporation, partnership, organization or any other entity that is not a natural person” and thus a person qualifies as an “insured” entitled to pursue Medical Payments coverage under the Progressive Policy only if they were “occupying” an “insured auto” a “temporary substitute auto” or a “trailer” while attached to an “insured auto;”
  - b. For purposes of the MedPay endorsement, “mobile equipment” only qualifies as an “insured auto” when: (1) it is being used in the business of BJV Construction; (2) operated on a public highway; and (3) operated in a state or province where it is subject to compulsory or financial responsibility law or other motor vehicle insurance law;
  - c. The Subject Crane was not being used in furtherance of BJV Construction’s business at the time of the Accident insofar as the Subject Crane was being used solely in furtherance of the business interests of Columbia Crane, a separate business owned by Roberto Gonzalez’s daughter;
  - d. The Subject Crane was not being operated on a public highway at the time of the Accident; and
  - e. Pursuant to *Canal* the Subject Crane was not subject to compulsory financial responsibility law or other motor vehicle insurance law when it was being used in the capacity it was, with the outriggers extended, at the time of the Accident.
36. For each of the foregoing reasons, Progressive is entitled to an Order holding:
- a. The Progressive Policy does not afford coverage for any losses sustained in the Accident, including but not limited to those alleged in the Underlying Litigation;
  - b. Progressive has no duty under the Progressive Policy to defend any individual or entity for claims arising from or relating to the Accident, including but not limited to those alleged in the Underlying Litigation;
  - c. Progressive has no duty under the Progressive Policy to indemnify any individual or entity for claims arising from or relating to the Accident, including but not limited to those alleged in the Underlying Litigation;

WHEREFORE, Progressive Northern Insurance Co. prays that the Court enter judgment in its favor as set forth herein and for such other and further relief as is just and proper.

Respectfully submitted this 10th day of October, 2024.

s/Robert “Rocky” C. Rogers

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